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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the *Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.)* (the "*Avena* Judgment"), I.C.J. No. 128 (judgment of Mar. 31, 2004), the International Court of Justice reviewed the convictions and death sentences of 51 named Mexican nationals, including Petitioner. It held that those individuals were entitled to receive review and reconsideration of their convictions and sentences through the post-conviction judicial process in the United States. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the judgment by giving those 51 individuals review and reconsideration of their convictions in the state courts. However, the Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the *Avena* Judgment. In light of that decision, Amicus will address the following question:

Are state courts bound by the Constitution to honor the international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* Judgment in the cases that the judgment addressed?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, amicus curiae American Bar Association ("ABA" or "Amicus") respectfully submits this brief in support of the position that the United States's obligations under the Vienna Convention bind states to give effect to the *Avena* Judgment in the cases that the judgment addressed.

STATEMENT OF INTEREST

The ABA is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 413,000 attorneys spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

Among the ABA's goals are "promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

condition" and "advanc[ing] the rule of law in the world." *See* http://www.abanet.org/about/goals.html. In 1998, the ABA House of Delegates adopted a resolution specifically recognizing the importance to the rule of law of State compliance with obligations undertaken through the Vienna Convention.[3]

While the ABA takes no position on the death penalty as a general matter, it is concerned about the effective representation of criminal defendants in capital cases. The ABA's House of Delegates has adopted several specific policies in this regard, including *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Guidelines*").[4] The Guidelines, originally adopted in 1989, amplify previously adopted Association positions on effective assistance of counsel in capital cases and "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." The ABA subsequently adopted a revised and detailed version

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[3] ABA House of Delegates Resolution 125, Policy on Consular Assistance (1998).

[4] ABA House of Delegates Resolution 107, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989). *See also ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.2 cmt. at 11 (3d ed. 1993) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 13 (1990); *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 51.2 cmt. at 12 (incorporating ABA Guidelines by reference); ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [*ABA Guidelines*].").

of these Guidelines in 2003 with specific guidance for foreign nationals subject to the Vienna Convention's protections.[5]

The Guidelines set forth specific guidance for attorneys representing foreign nationals. *See* Guideline 10.6 – Additional Obligations of Counsel Representing a Foreign National, adopted by the House of Delegates in February 2003. That Guideline instructs that at every stage of a case, counsel "should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." *Id.* Unless predecessor counsel has already done so, an attorney representing a foreign national is instructed to "immediately advise the client of his or her right to communicate with the relevant consular office," to "obtain the consent of the client to contact the consular office," and then to immediately contact the consular office to inform it of the client's detention or arrest. *Id.*

SUMMARY OF ARGUMENT

International treaties constitute federal law, and as such are binding on the United States as a whole and preempt any conflicting state laws through the Constitution's Supremacy Clause. The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention") is a treaty, duly ratified by the United States Senate. Article 36 of the Vienna Convention guarantees to the citizens of all signatory nations effective notice and access to consular services if they are arrested in another signatory nation. The companion Optional Protocol, to which the United States was also a signatory until February 28, 2005, provides for compulsory jurisdiction by the International Court of Justice ("ICJ") over all signatory nations to resolve disputes concerning the interpretation of the Convention's

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[5] *See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003).

provisions, including Article 36. *See* Optional Protocol, 21 U.S.T. 325, art. I.

The United States's withdrawal from the Optional Protocol in 2005 does not alter the United States's obligation to comply with judgments in cases to which the United States was a party and which were issued by the ICJ before its withdrawal.[6] Both the rule of law, and the United States's commitment as a signatory to the United Nations Charter Article 94(1), require that all courts within the United States honor and enforce such judgments. *See* 59 Stat. 1031, T.S. 993 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.").

In the instant case, the State of Texas has violated Supremacy Clause principles by declining, in a state post-conviction proceeding, to enforce an ICJ decision to which the United States is bound. The application of Article 36 of the Vienna Convention to Petitioner, Mr. Medellin, was formally decided in a 2004 ICJ case filed by Mexico against the United States, on behalf of Mr. Medellin and certain other Mexican citizens.[7] The ICJ ruled in that case that Texas's failure to advise Petitioner of his right to consular services violated both Mexico's and Petitioner's rights under the Convention. *See Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31, 2004) ("*Avena* Judgment") ¶¶ 106, 153(4)-(7). Although the ICJ denied Mexico's request for annulment of the convictions

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[6] The ABA has not taken any position on the United States' withdrawal from the Optional Protocol and does not intend to take any position on this decision through submission of this brief.

[7] Mexico initially filed on behalf of 54 of its nationals, which was subsequently reduced to 52 at the time of decision. The ICJ concluded that Mexico failed to prove a violation with respect to one of the 52 remaining Mexican nationals. *See Avena* Judgment ¶ 74.

and sentences, *id.* ¶ 123, the ICJ held that United States courts must provide review and reconsideration of the convictions and sentences involving the violations it had found. *Id.* ¶¶ 121, 128-34. The ICJ also specifically held that applying procedural default doctrines to bar consideration of the Mexican nationals' Vienna Convention claims would itself violate the Vienna Convention. *Id.* ¶¶ 112-13.[8]

Notwithstanding the *Avena* Judgment, the Texas Court of Criminal Appeals held in the proceeding below that Mr. Medellin's claim was foreclosed by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). *See Ex parte Medellín*, __S.W.3d __, 2006 WL 3302639, at *9 (Nov. 15, 2006). In so holding, the Texas court did not consider whether the *Avena* Judgment would be binding in the cases of the 51 nationals, including Petitioner, whose cases the ICJ specifically adjudicated. Thus, unlike *Sanchez-Llamas*, this case implicates the United States's legal duty to honor the judgments entered by the ICJ during the time the Optional Protocol was in effect. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Medellin v. Texas*,

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[8] The *Avena* Judgment developed and strengthened the ICJ's earlier judgment in the *LaGrand Case*, a case brought by Germany against the United States also alleging violations of the Vienna Convention. *LaGrand Case (Germany v. U.S.)*, 2001 I.C.J. 466 (June 27) ("*LaGrand*"). Unlike in *Avena*, by the time the ICJ ruled in *LaGrand*, both of the German nationals in question had been executed. The ICJ held in *LaGrand* that: (1) Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; (2) applying procedural default rules to prevent detained individuals from challenging their convictions and sentences on the ground that their rights under Article 36 of the Vienna Convention had been violated, itself violated the Vienna Convention; and (3) if the United States failed to comply with Article 36 in future cases involving German nationals subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* ¶¶ 77, 90-91, 125.

No. 06-984 (Mar. 2007) ("[*Sanchez-Llamas*] involved the question whether an ICJ *interpretation* should be given effect in this country's courts. Because it did not present the question whether an ICJ *decision* should be given effect, it did not resolve that question.").

The *Avena* Judgment was rendered prior to February 28, 2005, while the United States was a party to the Optional Protocol and thus legally bound to abide by the results of the Optional Protocol's dispute resolution process. Consistent with that federal obligation, the *Avena* Judgment's conclusions—namely, that the Vienna Convention's consular notice provision was violated, and that this violation is not subject to domestic procedural default rules—must be given full effect in our domestic legal system in cases involving a party subject to that decision. This obligation is not affected by an assertion that a United States court might have resolved the issues in that case differently in the first instance. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 203 (1895) ("[T]he merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact.").

Structural constitutional principles beyond the Supremacy Clause itself also require that United States courts give effect to the *Avena* Judgment. The need for uniform conduct among the states in matters of international relations is essential to effecting the treaty powers enjoyed by the President and the Senate, and must take precedence over the policy interests underlying procedural rules—interests that are themselves subject to balancing. The interests of comity would not be undermined by enforcing federal treaty obligations in state post-conviction proceedings. Moreover, the burden on state courts to resolve the claims of the named individuals who had their rights determined in the *Avena* Judgment would be minimal given the relatively small number of individuals who are the subject of that decision.

None of the potential problems with reconciling the ruling of the ICJ in *Avena* with the requirements of federal habeas that this Court noted in *Medellin v. Dretke*, 544 U.S. 660 (2005), exist here. The structural source of those potential problems was the parity between treaties and federal statutes—in particular, between the Vienna Convention and the Antiterrorism and Effective Death Penalty Act. Here, however, it is a conflict between a federal treaty obligation and a state procedural rule that must be reconciled, and it is clear that, under the Supremacy Clause, the federal treaty obligations must prevail.

Accordingly, the ABA urges this Court to hold, as a matter of law, that the *Avena* Judgment must be given effect as binding upon the courts of Texas pursuant to federal law.

ARGUMENT

I. The *Avena* Judgment is binding as to the rights of the 51 named defendants and Mexico.

By ratifying the Vienna Convention, the United States committed itself to the consular notification and access provisions of Article 36. That commitment is binding federal law which, under the Supremacy Clause of the United States Constitution, takes precedence over any contrary state law. U.S. CONST. art. VI, cl. 2 ("all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and judges in every State shall be bound thereby."); *United States v. Belmont*, 301 U.S. 324, 331 (1937).[9]

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[9] The United States Department of State, realizing the importance of ensuring reciprocal compliance by other nations, recently confirmed the Executive Branch's commitment to securing the rights created by Article 36. *See* United States Department of State Announcement: All Consular Notification Requirements (Cont'd)

The United States also committed, by ratifying the accompanying Optional Protocol, to submit Vienna Convention disputes to ICJ jurisdiction and to comply with the ICJ's judgment in those cases. *See* Optional Protocol, art. I (providing that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice."). That obligation is reinforced by the U.N. Charter, which requires U.N. Members to abide by any decision duly entered by the ICJ to which they are parties. U.N. Charter Article 94(1), 59 Stat. 1031, T.S. 993 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."). Thus, throughout the period when the United States was a party to the Optional Protocol, disputes over interpretation of the Vienna Convention were subject to the ICJ's compulsory jurisdiction, and enforceable pursuant to federal law in cases where the United States was a party. While decisions of the ICJ have a more narrow precedential effect than those of domestic courts, an ICJ judgment is binding with regard to the specific parties that are the subject of the judgment. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (ICJ Judgments' binding force applies to "the parties and in respect of that particular case") (quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945)).

Because Mr. Medellin is one of the Mexican nationals whose rights were determined by the *Avena* Judgment, that judgment binds courts in the United States adjudicating the lawfulness of Mr. Medellin's detention. That legal obligation is not affected by the later decision of the United States to

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Remain in Effect, *available at* http://travel.state.gov/news/news_2155.html ("The U.S. is fully committed to compliance with our international legal obligations under the [Vienna Convention], and actively works to improve compliance nationally.").

withdraw from the Optional Protocol, which has prospective effect only. Thus, any state procedural bar or other state law rule that would prevent consideration of Mr. Medellin's consular notification claims would necessarily conflict with the federal law unless such an exception is permitted by the Vienna Convention itself. No such exception exists here.

On the contrary, the ICJ specifically held that the Vienna Convention forbids application of domestic procedural default rules to preclude review or relief for Vienna Convention violations. *Avena* Judgment ¶ 113 (holding application of procedural default rule would prevent "'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violate[s] paragraph 2 of Article 36.").

The *Avena* Judgment, as applied to Mr. Medellin, thus prohibits Texas's procedural rules from acting as a bar to review of Mr. Medellin's claim that the violation of the Vienna Convention rendered his conviction invalid. *See id.* ¶ 139 (stressing the importance to the "review and reconsideration process [of] the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention"). Indeed, to allow Texas to deprive Mr. Medellin of his right to present that claim would violate supremacy principles and effectively permit a state court to defy a federally recognized judgment.[10]

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[10] Roughly 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ. *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58–81 (Lori F. Damrosch ed., 1987). The United States has been involved in more ICJ cases than any other state. *See* ICJ, Contentious Cases Ordered by Country Involved, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&p3=1. Texas's failure to carry out the *Avena*

(Cont'd)

The supremacy of treaty law over state law requires that treaty obligations be given their natural effect and not be narrowly construed in deference to states. *See Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) ("[T]he meaning of treaty provisions . . . is not restricted by any necessity of avoiding possible conflict with state legislation. . . ."). As such, this Court has expressly disclaimed attempts to adopt a canon of avoidance when interpreting treaties in potential conflict with state law, because doing so would permit individual states effectively to shape and modify interpretation of binding federal treaty obligations. *Id.*

Portending this Court's long history of acting to prevent or remedy treaty violations by the states, in an early case in American history, *Ware v. Hylton*, the Court struck down a state statute rather than a U.S. treaty. 3 U.S. (3 Dall.) 199, 237 (1796) ("If a law of a State, contrary to a treaty, is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole."); *see also Neilsen v. Johnson*, 279 U.S. 47 (1929); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Martin v. Hunter's Lessee*, 14 U.S. (Wheat.) 304 (1816). Likewise, states cannot withdraw from treaties, nor are they free to abrogate United States's obligations. Indeed, it was the failure of states to observe the treaties made by the Continental Congress that was one of the practices that lead to the calling of the Constitutional Convention. *See* THOMAS ANDREW BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE, ch. V (8th ed. 1968); *see also* The Federalist No. 15 at 106 (Hamilton) (Benjamin Fletcher Wright ed., 1961); No. 22 at 144–55 (Hamilton); No. 42 at 265 (Madison).

(Cont'd)

Judgment with respect to the 51 named Mexican nationals could prejudice the ability of the United States to hold other states to their dispute settlement obligations.

The United States Government has determined that, in light of the nation's foreign policy interests, "there is a pressing need for expeditious compliance with [the *Avena*] decision." Brief for the United States as Amicus Curiae Supporting Respondent at 42, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). The President has characterized the *Avena* Judgment as an "international obligation" to be discharged "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in the decision." President George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). Accordingly, the decision of the Texas courts to disregard the binding nature of the *Avena* Judgment, and to interpose domestic procedural rules inconsistent with that judgment, is a violation of the Supremacy Clause and an improper intrusion on the federal government's exclusive treaty-making and implementation authority. *See United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested with the national government exclusively.").

II. The goal of the procedural default doctrine is to reduce the burdens that habeas proceedings place on state and federal courts is not applicable in the context of the federal government's plenary power over foreign relations.

A. The federal government's exclusive power regarding foreign relations requires that United States courts consistently enforce federal treaties regardless of contrary state procedural rules.

In matters of international relations, federal interests are both paramount and exclusive of state interests. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) ("concern for uniformity in this country's dealings with foreign nations ... animated the Constitution's allocation

of the foreign relations power to the National Government") (internal quotation marks omitted). In contrast, the procedural default doctrine is a jurisprudential rule crafted to protect the integrity of trial court proceedings.[11] A principal goal of the doctrine is to reduce the burdens habeas cases place on state and federal courts.[12] Because of the need for the United States to assure treaty partners that its treaty obligations will be uniformly enforced, conflicting procedural default rules must yield to this paramount federal interest.

The Constitution entrusts the federal government with "full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). As this Court has emphasized, "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.*; *see also Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933) ("In international

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[11] *See Dretke v. Haley*, 541 U.S. 386, 394 (2004) (referring to the exceptions to the procedural default doctrine as "judge-made rules"); Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 HOFSTRA L. REV. 1005, 1014 (1990) ("[R]espect for state procedural default rules is a judge-made doctrine, not directly drawn from any express statutory provision.").

[12] *See Murray v. Carrier*, 477 U.S. 478, 487-88 (1986) (refining the procedural default doctrine with the explicit goal of minimizing the burden on federal habeas courts). Federal-state comity also motivated the federal procedural default doctrine. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *Reed v. Ross*, 468 U.S. 1, 11 (1984) (explaining that considerations of comity and concerns for the orderly administration of criminal justice motivate the procedural default doctrine); *Coleman v. Thompson*, 501 U.S. 722, 730-32 (1991) (explaining that "concerns of comity and federalism" underlie procedural default rules).

relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); The Federalist No. 80, at 500 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("[T]he peace of the *whole* ought not to be left at the disposal of a *part*").

It is precisely because of the importance of ensuring that the entire country speak with one voice in international relations and that the United States be able to fulfill its international obligations, that the Constitution explicitly makes treaties "the supreme Law of the Land," overriding "any Thing in the Constitution or Laws of any State to the Contrary."[13] U.S. CONST. art. VI, cl. 2. "It is the declared duty" of both state and federal judges, under the Supremacy Clause, "to determine any Constitution, or laws of any State, contrary to [a] treaty ... made under the authority of the United States, null and void." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796); *see also Hauenstein v. Lynham*, 100 U.S. 483, 489 (1879) ("It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State.").

When a state arrests or prosecutes a citizen of a country that is a signatory to the Vienna Convention and fails to comply with the Convention's requirements, that failure violates not only the defendant's rights, but also the rights of the defendant's home country. *See, e.g., LaGrand* ¶ 74 ("[W]hen the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide

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[13] The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and the Senate unanimously ratified both instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). Accordingly, the Vienna Convention has the force of a treaty under the Constitution.

the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36"); *Avena* Judgment ¶ 102 (describing the United States as precluding Mexico "from exercising its right" under one provision of the Convention). Those rights include the rights "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36 ¶ 1(c).

Permitting Texas to preempt enforcement of the United States's commitment to implement the *Avena* Judgment would allow an individual state—through use of its own procedural bar—to impair the exclusive federal power to conduct relations with foreign sovereigns. When this is permitted, it is the federal government, not the State, that must contend with the resulting tension which, as this very case demonstrates, can substantially undermine the often-delicate relations between nations.

The impact on international relations distinguishes cases involving the *Avena* Judgment from other federal rights in which a state's interest in its procedural default rules is entitled to deference. Generally, if an American defendant violates a state procedural rule in attempting to assert an individual federal right, only that individual's rights are affected. In such situations, this Court has determined that broader policy concerns dictate that, absent cause and prejudice, the individual may forfeit that federal right. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977).

This balancing of interests is not applicable, however, when the right at issue belongs not just to the defendant, but also to his home country, through federally established treaty obligations. It would violate the federal government's exclusive power to conduct international relations to apply a conflicting balancing test that permits, and would effectively impose on another sovereign nation, obligations that are contrary to its treaty rights. Accordingly, this Court should give effect to the *Avena* Judgment's holding that, as to the 51 named individuals, Mexico's right to adjudication of certain issues may not be affected by domestic procedural rules.

B. Giving effect to the *Avena* Judgment would not create a significant burden for state or federal courts.

Giving effect to the *Avena* Judgment would not open the floodgates to state or federal habeas claimants. *Avena* Judgment claims would be limited to those individuals affected by the judgment and such claims would be litigated first in state court. Litigation in state court would reduce the need for federal courts to evaluate the claims in the first instance, without the benefit of state court consideration. *Cf. Wainwright*, 433 U.S. at 89-90 (explaining that if state appellate courts know that federal issues "raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal[,]" they will have to choose "between addressing the issue notwithstanding the petitioner's failure to timely object, [and] fac[ing] the prospect that the federal habeas court will decide the question without the benefit of their views"). Any impact on state and federal courts' workload created by giving effect to the *Avena* Judgment would be de minimis and would have no long term effect on the state judicial systems.

III. There are no structural barriers to implementing the *Avena* Judgment.

In *Medellin v. Dretke*, 544 U.S. 660 (2005), this Court noted several potential problems with reconciling the ruling of the ICJ in the *Avena* Judgment with the procedural requirements in federal habeas proceedings. For example, the Court cited the likely difficulty in showing that a violation of consular access provisions was more than a "nonconstitutional lapse[] [the Court had] held not to be cognizable in a [federal] postconviction proceeding." *Id.* at 664 (quoting *Reed v. Farley*, 512 U.S. 339, 340 (1994)). The Court also noted that the non-constitutional nature of the treaty violation could impede the grant of a certificate of appealability, as required by 28 U.S.C. § 2253(c). *Id.*

The structural source of these difficulties is the "full parity" between treaties and federal statutes. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion). These types of treaties and federal laws have the same status under Art. VI of the Constitution—they are the "supreme Law of the Land." Reconciling countervailing commands from coequal sources of law can give rise to problems of interpretation that may ultimately alter the scope of treaty obligations, but that interpretation remains firmly in the province of the federal government. It is an entirely different situation when a treaty and state law contain conflicting commands; in that instance, the treaty trumps state law. *See Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law.").

Moreover, the Constitution imposes an independent obligation on states to enforce federal law in their own courts

absent an express exemption from Congress. *See Tafflin v. Levitt*, 493 U.S. 455, 469-70 (1990) (Scalia, J., concurring) ("'[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State. . . .'") (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)). Accordingly, a State *must* recognize and implement treaties even if they are inconsistent with its laws. *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement.").

In sum, because the Vienna Convention is a treaty to which the U.S. remains a party, and the United States was a party to Optional Protocol when the *Avena* Judgment was handed down, the several states and their courts are bound to honor that decision. Thus, the Texas Court of Criminal Appeals should not be permitted to alter the scope of the United States's treaty obligations by invoking its state procedural bar to dispose of Mr. Medellin's Article 36 claims in a manner inconsistent with the *Avena* Judgment.

IV. Giving effect to the *Avena* Judgment promotes the international rule of law.

As this Court has observed: "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own

nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The Vienna Convention is designed to enable countries to help their own nationals when those nationals are abroad, in part by agreeing to allow other countries to take similar steps where their citizens are concerned.

The United States used the dispute resolution mechanism provided by the Optional Protocol to enforce the protections specified in the Vienna Convention to protect its own citizens when it brought an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15), 1980 I.C.J. 3 (May 24). In bringing that application, the United States relied on the Optional Protocol's establishment of the ICJ's compulsory jurisdiction over disputes arising out of the interpretation or application of the Vienna Convention. When the ICJ ruled in favor of the United States provisionally in 1979 and then finally in 1980, 1979 I.C.J. 7, 1980 I.C.J. 3, the United States insisted that Iran was bound to comply with the court's judgment. *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, at 9 ("The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Tehran Government to carry out its provisions.").

Allowing state courts to refuse to abide by an ICJ judgment that was rendered while the United States was a party to the Optional Protocol would compromise important structural protections established by the Constitution to ensure that the federal government alone controls when the United States will consent to treaties and other international agreements. The President's signature on the Optional

Protocol, the Senate's ratification of that treaty, and the United States's submission to proceedings before the ICJ through to judgment, all reflect decisions committed exclusively to the federal government in the conduct of foreign affairs, superior to any state law. But they also reflect a fundamental commitment to the rule of law. Although President George W. Bush has now withdrawn the United States from the Optional Protocol, the President himself has expressed the importance of honoring this federal commitment, and his expectation that the courts of the United States would comply with the *Avena* Judgment in this case. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 41-42, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). This commitment to honor treaty obligations, even when they are potentially inconvenient or contrary to individual state interests, reflects the essence of the rule of law.

CONCLUSION

For the reasons set forth above, and consistent with its commitment to promoting the rule of law, the ABA respectively submits that the Court should reverse the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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